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## New Wine in an Old Chalice: The Ministerial Exception's Humble Roots

### INTRODUCTION

Though she had earned two promotions during her 16-year career with Lockheed Martin in New Orleans, Ms. Agnes Motton read one particular office memorandum in 1995 with disappointment.<sup>1</sup> Her employer had selected other candidates to fill the open Control Mechanic positions for which she had interviewed.<sup>2</sup> Oddly, all four of them were male.<sup>3</sup>

Confident in her claim, Motton sued Lockheed Martin on unjust discrimination grounds.<sup>4</sup> After establishing her *prima facie* case, Motton further asserted her superior qualifications as compared to those hired.<sup>5</sup> The Louisiana Fourth Circuit Court of Appeal agreed, finding that Motton's length and breadth of experience surpassed those of two hired Control Mechanics.<sup>6</sup> Although Lockheed Martin disputed the allegations, it could not muster a legitimate reason for failing to promote Motton.<sup>7</sup> Ultimately, the court held Lockheed Martin accountable for intentional sex discrimination against Motton, signaling legal and societal intolerance for unfair employment discrimination.<sup>8</sup>

In jarring contrast with this result, if Lockheed Martin had been a religious institution and Motton had applied for a position entailing ministerial duties, all other facts being equal, the ministerial exception may have squelched Motton's sex discrimination claim. As a mechanism "rooted in the First Amendment's guarantees of religious freedom,"<sup>9</sup> the judicially created ministerial exception precludes courts from adjudicating

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1. *See* Motton v. Lockheed Martin Corp., 900 So. 2d 901, 906–07 (La. Ct. App. 4th 2005) (per curiam).

2. *See id.*

3. *Id.* at 907.

4. *Id.* ("Subsequently, Ms. Motton filed suit in state court under Louisiana's employment discrimination statutes, alleging Lockheed intentionally discriminated against her in denying her a promotion to the Control Mechanic's position based upon her sex and race.").

5. *See id.* at 909–13.

6. *Id.* at 914 ("Based on each candidates [sic] qualifications, it seems reasonable to conclude the jury found Motton was clearly better qualified than Dennis Caddell and Willie Henderson.").

7. *Id.* ("We find it reasonable to believe the fact finder, the jury, rejected Lockheed's explanation for not hiring Ms. Motton.").

8. *Id.* at 914–15 ("We find the trial court did not err by finding that Lockheed intentionally discriminated against Ms. Motton on the basis of sex.").

9. Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225 (6th Cir. 2007).

certain employment discrimination claims. By definition, the ministerial exception, as it has developed, “operates to exempt from the coverage of various employment laws the employment relationships between religious institutions and their ‘ministers.’”<sup>10</sup> Under the altered *Motton* facts, the ministerial exception would perhaps leave Motton without a legal remedy, and her religious employer would face no consequences whatsoever for its actions. Motton would not even get her day in court, illustrating a disconnect between largely similar factual scenarios yielding wildly different results. The crux of this rift juxtaposes two core values of American law and society—religious interests on one hand and protection against discrimination on the other.

This Comment explores the viability of the ministerial exception in its current form against the backdrop of employment discrimination laws such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.<sup>11</sup> These federal statutes protect employees from discrimination on several bases, including sex, religion, disability, and age. At present, the ministerial exception may prohibit any employment discrimination claim, while some statutory exceptions to Title VII permit discrimination only on the basis of religion.<sup>12</sup>

In a palpable sense, the ministerial exception has expanded since its inception in *McClure v. Salvation Army*, which defined the exception’s scope as covering the church–minister relationship.<sup>13</sup> This broadening trend has opened the door for religious employers to discriminate against certain employees and then look to the ministerial exception as protection against legal action. It is precisely this shield that would thwart Motton’s discrimination claim in the hypothetical religious scenario. Such drastic expansion of the ministerial exception risks sacrificing employee safeguards against discrimination, which embody a critical societal policy.

On January 11, 2012, the Supreme Court for the first time recognized “such a ministerial exception” in *Hosanna–Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, a case addressing whether the ministerial

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10. *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 800 (4th Cir. 2000).

11. *See infra* Part I.A.

12. The religious organization, 42 U.S.C. § 2000e-1 (2006), and religious curriculum, *id.* § 2000e-2(e)(2), exceptions exempt only discrimination based on religion. Title VII further contains a bona fide occupational qualification (BFOQ) exception, which applies more broadly. *See infra* Part I.A.

13. *See McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972).

exception applied to a teacher at a Lutheran school.<sup>14</sup> While the ministerial exception has varied in its application since *McClure*, *Hosanna–Tabor* presented an opportunity for articulation of a definitive ministerial exception inquiry. In view of the inconsistent results that ministerial exception jurisprudence has fostered, the need for a clarified standard is pressing.<sup>15</sup>

In general, courts routinely cite the First Amendment’s Religion Clauses as grounds to apply the ministerial exception.<sup>16</sup> In doing so, courts afford the First Amendment significant weight, particularly with the exception’s continued expansion. Perhaps refusing religious discrimination allowances entirely would constitute the most serious threat to the free exercise of religion. With its statutory exceptions, Congress indeed grants several exemptions.<sup>17</sup> If these currently cover too little, the remedial expansion should occur through legislation instead of case law.

Mindful of the Supreme Court’s ruling in *Hosanna–Tabor*, this Comment argues chiefly that the ministerial exception moving forward should inquire whether the employer–employee relationship satisfies the original intent standard under *McClure*.<sup>18</sup> Furthermore, any expansion or deviation from the pure, originally intended form of the ministerial exception, as courts have been apt to effect, must come from Congress. Extended or more numerous statutory exceptions would properly ensue, instead of leaving the ministerial exception to the unbridled whim of court discretion. Part I of this Comment provides the necessary background on federal employment discrimination laws and explores the pertinent exceptions to these regulations. After outlining the statutory exceptions, Part I then tracks the ministerial exception’s inception, expansion, and ascension to the high court. Part II analyzes the ministerial exception’s development and establishes its inconsistent application since *McClure*. Part II then demonstrates the need for a more consistent ministerial exception standard and endorses a narrow, original-intent approach. Part III surveys other scholarly recommendations to remedy the current ministerial exception, nodding more animatedly to the narrowing proposals. Part IV recognizes the ministerial exception’s interaction with the Religion Clauses of the First Amendment and addresses the potential problems that a narrow approach could prompt. Finally,

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14. *Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

15. See *infra* Part II.

16. See discussion *infra* Part IV.A–B. The First Amendment provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend. I.

17. See *infra* Part I.A.

18. See *McClure*, 460 F.2d at 558–59.

Part V emphasizes the Supreme Court's unique opportunity with *Hosanna-Tabor*, evaluates the ruling's utility, and proposes a more concrete ministerial exception inquiry for the future. Furthermore, Part V accentuates the Comment's call for action: a definitive reaffirmation of the ministerial exception's original intent, requiring any further protection for religious employers to come from Congress instead of arising as the product of a court's discretion.

## I. FOUNDATION THROUGH EXPANSION: THE LAWS AND EXCEPTIONS

### *A. Federal Employment Discrimination Laws and the Statutory Exceptions*

On the reasonable premise that discrimination, in all its various forms and particularly in employment, should be eradicated, Congress in the mid-to-late twentieth century passed three key sets of provisions to ensure protection from employment discrimination. Title VII of the Civil Rights Act of 1964<sup>19</sup> contains the most sweeping set of protections, establishing that "it shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>20</sup> To cast a wider net and protect against age and disability discrimination, Congress passed the Age Discrimination in Employment Act of 1967 (ADEA)<sup>21</sup> and the Americans with Disabilities Act of 1990 (ADA).<sup>22</sup> With these measures, Congress sought to level the employment playing field and ensure equality across the working public.

In setting these limits, Congress further considered which boundaries would constitute strict rules and which would be more flexible. Religion has, over time, triggered the malleability of these

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19. 42 U.S.C. §§ 2000e–2000e-17 (2006 & Supp. V 2011).

20. *Id.* § 2000e-2(a)(1) (2006).

21. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006 & Supp. V 2011). The relevant section provides: "It shall be unlawful for an employer—to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Id.* § 623(a)(1) (2006).

22. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12217 (2006 & Supp. V 2011). The relevant section provides: "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* § 12112(a) (Supp. V 2011).

protections. Like most general rules, Title VII, the ADEA, and the ADA are subject to exceptions.<sup>23</sup> Title VII is subject to a set of statutory exceptions due to three special allowances Congress wished to provide employers possessing certain religious attributes. First, the religious organization exception holds the Title VII prohibition on religious discrimination inapplicable to “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”<sup>24</sup> Second, the religious curriculum exception exempts schools owned, supported, controlled, or managed by a particular religion or operating on a religious curriculum.<sup>25</sup> These two statutory exceptions permit discrimination only on the basis of an employee’s or prospective employee’s religion—and not based on one’s race, sex, or national origin.<sup>26</sup> Finally, the bona fide occupational qualification (BFOQ) exception authorizes otherwise unlawful practices “on the basis of [an employee’s] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”<sup>27</sup> In contrast with the religious organization and curriculum exceptions, the broad BFOQ exception permits discrimination on bases other than religion, though it does not apply to race and color.

### *B. The Ministerial Exception*

Unlike the three statutory exceptions, rigid in their singular application to Title VII, the judicially created ministerial exception

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23. Though beyond the scope of this Comment, the ADEA and ADA contain exceptions such as the ADEA’s BFOQ exception, 29 U.S.C. § 623(f)(1) (2006), and the ADA’s “direct threat” defense, 42 U.S.C. § 12113(b) (2006).

24. 42 U.S.C. § 2000e-1(a).

25. *Id.* § 2000e-2(e)(2) (“Notwithstanding any other provision of this subchapter . . . it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.”).

26. Jamie Derin Prenkert, *Liberty, Diversity, Academic Freedom, and Survival: Preferential Hiring Among Religiously-Affiliated Institutions of Higher Education*, 22 HOFSTRA LAB. & EMP. L.J. 1, 22 (2004).

27. 42 U.S.C. § 2000e-2(e)(1).

pertains not only to Title VII but also to claims brought under both the ADEA<sup>28</sup> and the ADA.<sup>29</sup> To the present day, courts “have universally recognized that the First Amendment protects houses of worship from state interference with the decision of who will teach and lead a congregation,”<sup>30</sup> prompting widespread adoption of the ministerial exception. While its application continues to develop, the ministerial exception “is grounded in the idea that the ‘introduction of government standards [in]to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state.’”<sup>31</sup> More specifically, the Religion Clauses of the First Amendment<sup>32</sup> are often implicated as mechanisms that “preserve[] a religious institution’s right to be free from governmental entanglement [with the] management of its internal affairs.”<sup>33</sup> While circuit courts have employed varying approaches as to how the ministerial exception applies procedurally,<sup>34</sup> decisions largely have trended toward agreement that the ministerial exception “allows religious employers to avoid liability for discrimination when making employment decisions concerning employees who qualify as ministers.”<sup>35</sup>

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28. EEOC v. Hosanna–Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 777 (6th Cir. 2010), *rev’d*, 132 S. Ct. 694 (2012) (“While the ministerial exception was first applied in the context of suits brought against religious employers under Title VII . . . the exception has been extended to suits brought against religious employers under the ADA.” (citing *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007); *Werft v. Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1100 (9th Cir. 2004); *Starkman v. Evans*, 198 F.3d 173, 175 (5th Cir. 1999))).

29. *Id.* at 777 n.6 (“Courts have also extended the ministerial exception to suits brought under the ADEA, the common law, and state law.” (citing *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007))).

30. *Coulee Catholic Sch. v. Labor & Indus. Review Comm’n*, 768 N.W.2d 868, 880 (Wis. 2009).

31. *Id.* (alteration in original) (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168–69 (4th Cir. 1985)).

32. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” U.S. CONST. amend. I. *See also* discussion *infra* Part IV.A–B.

33. *Rweyemamu v. Cote*, 520 F.3d 198, 201 (2d Cir. 2008) (second alteration in original) (quoting *Rweyemamu v. Cote*, No. 3:05CV00969, 2006 WL 306654, at \*3 (D. Conn. Feb. 8, 2006), *aff’d*, 520 F.3d 198 (2d Cir. 2008)) (internal quotation marks omitted).

34. *Id.* at 206 n.4; *Hosanna–Tabor*, 597 F.3d at 775. In a footnote, the Supreme Court recently clarified the matter, concluding that the exception “operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.” *Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 n.4 (2012).

35. Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1776 (2008).

When applying the statutory exceptions, courts battle with statutory structure and language; however, the ministerial exception provides for a less consistent standard, hardly uniform in its application. Prior to the Supreme Court ruling, courts tended to utilize a test similar to the Sixth Circuit's approach in *Hosanna-Tabor*—"[f]or the ministerial exception to bar an employment discrimination claim, two factors must be present: (1) the employer must be a religious institution, and (2) the employee must be a ministerial employee."<sup>36</sup>

To fall within the first prong's religious institution category, "the employer need not be a traditional religious organization, such as a church, diocese, or synagogue, nor must it be an entity operated by a traditional religious organization. Rather, a religiously affiliated entity is considered a religious institution if its 'mission is marked by clear or obvious religious characteristics.'"<sup>37</sup> For the employee's role to qualify as ministerial in nature, the Sixth Circuit, in line with other courts of appeals, "has instructed courts to look at the function, or 'primary duties' of the employee."<sup>38</sup> Provided that "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship,"<sup>39</sup> the employee in question will satisfy the test's second prong.

The requirement that the finder of fact must carefully examine characteristics regarding each prong serves as the common thread across the test's two components. Though unconcerned with statutory language, ministerial exception inquiries compel questions of whether particular qualities are present, similar in process to courts' statutory exception inquiries.<sup>40</sup> Unlike the statutory religious organization and curriculum exceptions, however, the ministerial exception permits discrimination in a broad sense, and "[f]or those few positions that the [ministerial] exception covers, its impact is significant."<sup>41</sup>

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36. *Hosanna-Tabor*, 597 F.3d at 778 (citing *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007)).

37. *Id.* (citing *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225, 226 (6th Cir. 2007)).

38. *Id.* (citing *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007)).

39. Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979).

40. See, e.g., *LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217 (3d Cir. 2007).

41. Prenkert, *supra* note 26, at 42.



*1. The Foundation: McClure v. Salvation Army*

At its core, the ministerial exception, as originally conceived, focuses on a far narrower set of circumstances than its expansion has encompassed. The landmark case of *McClure v. Salvation Army*<sup>42</sup> serves as the exception's foundation. As the very first sentence of its opinion, the Fifth Circuit wrote: "The Salvation Army is a church and Mrs. Billie B. McClure is one of its ordained ministers."<sup>43</sup> From the literal beginning, the court set forth the church-minister<sup>44</sup> relationship, which, at the end of the day, comprises the exception's most critical inquiry. Upon termination from her position, McClure sued The Salvation Army, "alleging that it had engaged in discriminatory employment practices against her in violation of Title VII."<sup>45</sup> The court framed the issue as centering on "whether Title VII of the Civil Rights Act of 1964 . . . applies to the employment relationship between a church and its ministers and, if applicable, whether the statute impinges upon the Religion Clauses of the First Amendment."<sup>46</sup>

Cognizant of the issue's import, the Fifth Circuit noted that "[r]estrictions on the free exercise of religion are allowed only when it is necessary 'to prevent grave and immediate danger to interests which the state may lawfully protect'"<sup>47</sup>—a principle one must constantly bear in mind with the ministerial exception. In resolving the issue with McClure and her former status as a minister, the ministerial exception, whether the court realized it, was born. The Fifth Circuit harkened back to two earlier United States Supreme Court cases<sup>48</sup> to inform its holding:

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42. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

43. *Id.* at 554.

44. *See id.* at 555 ("After undergoing a two year training period at The Salvation Army's Officers Training School, Mrs. McClure was commissioned as an officer [minister] in June, 1967." (alteration in original)).

45. *Id.* The court continued: "More specifically, [McClure] alleged that she had received less salary and fewer benefits than that accorded similarly situated male officers, also that she had been discharged because of her complaints to her superiors and the Equal Employment Opportunity Commission [EEOC] with regard to these practices." *Id.* (second alteration in original).

46. *Id.* at 554–55. In other words, "[d]oes the application of the provisions of Title VII to the relationship between The Salvation Army and Mrs. McClure (a church and its minister) violate either of the Religion Clauses of the First Amendment?" *Id.* at 558.

47. *Id.* at 558 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)). Such restrictions are likely due to the fact that "[t]he Supreme Court has many times recognized that the First Amendment has built a 'wall of separation' between church and State." *Id.*

48. In *Watson v. Jones*, 80 U.S. 679 (1871), "the Supreme Court began to place matters of church government and administration beyond the purview of

[T]he application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, *a church and its minister*[,] would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.<sup>49</sup>

For the Fifth Circuit, “the relationship between an organized church and its ministers is its lifeblood.”<sup>50</sup> By the court’s reasoning, a Title VII application to the church–minister relationship would “cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern.”<sup>51</sup> Accordingly, this intrusion would leave the church “without the power to decide for itself, free from state interference, matters of church administration and government.”<sup>52</sup> In essence, the Fifth Circuit removed itself from the proceedings, effectively concluding that The Salvation Army’s discrimination against McClure, if it occurred, would be left without a lawful remedy.

## 2. *The Expansion*: Rayburn v. General Conference of Seventh-Day Adventists

Courts have not advocated outright the ministerial exception’s abolition; rather, they have steadily expanded the doctrine. Courts have often cited the Fourth Circuit’s decision in *Rayburn v. General Conference of Seventh-Day Adventists*<sup>53</sup> as the source for the *primary*

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civil authorities.” *McClure*, 460 F.2d at 559. Additionally, the Supreme Court recognized in 1929 that “[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.” *Id.* (quoting *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929)).

49. *Id.* at 560 (emphasis added).

50. *Id.* at 559. The court continued: “The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.” *Id.* It is critical to note the court’s consistent references to the church–minister relationship, which its holding is meant to protect.

51. *Id.* at 560.

52. *Id.*

53. *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985).

*duties test*.<sup>54</sup> “As a general rule, if the employee’s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in a religious ritual and worship, he or she should be considered ‘clergy.’”<sup>55</sup> In *Rayburn*, the Fourth Circuit simply needed to decide “whether a woman denied a pastoral position in the Seventh-day Adventist Church may charge that church with sexual and racial discrimination under Title VII of the Civil Rights Act of 1964.”<sup>56</sup> Though *Rayburn* may present nothing outside the realm of the ministerial exception freeing a church–minister relationship from the law, courts often cite *Rayburn* as authority to examine an employee’s function and duties to determine whether the exception applies.<sup>57</sup>

Without question, the Fourth Circuit recognized the importance of staying out of key church matters.<sup>58</sup> The court, however, shuffled past the narrower doctrinal inquiry in suggesting that “[t]he ‘ministerial exception’ to Title VII first articulated in *McClure v. Salvation Army* . . . does not depend upon ordination but upon the function of the position.”<sup>59</sup> In opening the door for a wider scope, *Rayburn* set the stage for the ministerial exception’s subsequent expansive application.

### 3. *The High Court: Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC*

In 2012, the Supreme Court had occasion to decide how Ms. Cheryl Perich, a Redford, Michigan, primary and elementary Lutheran school teacher, fit within the ministerial exception, or whether indeed she fit at all. On appeal, the Sixth Circuit had held Perich beyond the ministerial exception’s reach. The Supreme Court’s final word on *Hosanna–Tabor* prompted an opportunity to embrace the trending expanded test or reconstruct the ministerial exception theory, perhaps by harkening back to the doctrine’s

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54. See, e.g., *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006).

55. *Rayburn*, 772 F.2d at 1169 (quoting Bagni, *supra* note 39) (internal quotation marks omitted).

56. *Id.* at 1164–65.

57. See, e.g., *Catholic Univ. of Am.*, 83 F.3d 455; *Petruska*, 462 F.3d 294.

58. See *Rayburn*, 772 F.2d at 1168 (“[P]erpetuation of a church’s existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large.”).

59. *Id.* at 1168–69 (citing *EEOC v. Sw. Baptist Seminary*, 651 F.2d 277 (5th Cir. 1981)).

intended purpose. *Hosanna–Tabor* exemplifies the continuing debate over the ministerial exception’s proper scope.

*a. The Facts: Perich’s Discrimination Claim*

As a Lutheran school, Hosanna–Tabor<sup>60</sup> employs a faculty consisting of “two types of teachers: ‘lay’ or ‘contract’ teachers and ‘called’ teachers.”<sup>61</sup> The difference between teachers in these two categories informs the ministerial exception debate in this case. While lay or contract teachers are hired by the school’s Board of Education on a yearly basis, called teachers “[are] hired by the voting members of the Hosanna–Tabor Lutheran Church congregation on the recommendation of the Board of Education, Board of Elders, and Board of Directors.”<sup>62</sup> To qualify as a called teacher, one must “complete ‘colloquy’ classes as required by the Lutheran Church–Missouri Synod that focus on various aspects of the Christian faith.”<sup>63</sup> Upon completing the requisite training, a called teacher earns “the title of ‘commissioned minister.’”<sup>64</sup>

In July 1999, Perich began her employment at Hosanna–Tabor as a contract teacher and worked as such for most of her first year. She soon completed her colloquy classes at Concordia College and “received her call from the Hosanna–Tabor Lutheran Church on March 29, 2000.”<sup>65</sup> Perich taught for five years at Hosanna–Tabor until taking disability leave for the 2004–2005 school year. She had fallen ill in the summer of 2004 at a Hosanna–Tabor golf outing, with a condition eventually diagnosed as narcolepsy.<sup>66</sup> Upon her doctor’s clearance, Perich wished to return to teaching.<sup>67</sup> Her employer had other plans. Though failing to convince Perich to sign a peaceful release agreement,<sup>68</sup> Hosanna–Tabor ultimately fired Perich due to her narcoleptic condition, voting to “rescind Perich’s call” in April 2005.<sup>69</sup> Consequently, Perich filed an employment

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60. “Hosanna–Tabor is a religious school that teaches kindergarten through eighth grades.” *EEOC v. Hosanna–Tabor Lutheran Church & Sch.*, 582 F. Supp. 2d 881, 883 (E.D. Mich. 2008), *vacated*, 597 F.3d 769, 777 (6th Cir. 2010), *rev’d*, 132 S. Ct. 694 (2012).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 884.

67. *See id.* at 884–85.

68. *See id.*

69. *Id.* at 886. Ironically, though the discussion of a contract law issue is beyond the scope of this Comment, Hosanna–Tabor’s called teachers traditionally

discrimination charge with the Equal Employment Opportunity Commission (EEOC) on account of her disability under the ADA.<sup>70</sup>

In response to the eventual suit in the Eastern District of Michigan, Hosanna–Tabor contended that Perich fit within the ministerial exception. If held to apply, the exception would prompt the court to refrain from interfering in the dispute altogether.<sup>71</sup> Though Perich’s title while teaching may have shifted from “contract” to “called,” nothing had changed about her position or day-to-day classroom tasks.<sup>72</sup> In sum, when considering her religious obligations, including regularly scheduled prayers and devotionals,<sup>73</sup> Perich’s “activities devoted to religion consumed only about forty-five minutes of the seven-hour school day.”<sup>74</sup>

Once *Hosanna–Tabor* ascended to the Supreme Court, the nine justices found two contrasting sets of analyses and likewise two conflicting outcomes between the district court and the Sixth Circuit. The district court held Perich within the scope of the ministerial exception,<sup>75</sup> freeing Hosanna–Tabor from any possible repercussions. The Sixth Circuit, however, reversed, allowing Perich’s ADA claim to proceed.<sup>76</sup>

*b. District Court Ruling: Within the Ministerial Exception’s Scope*

According to the district court, it was “prudent in this case to trust Hosanna–Tabor’s characterization of its own employee in the months and years *preceding* the events that led to litigation.”<sup>77</sup>

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“are hired on an open ended basis and cannot be summarily dismissed without cause.” *Id.* at 883.

70. *Id.* at 886.

71. See discussion *supra* Part I.B.

72. *Hosanna–Tabor*, 582 F. Supp. 2d at 883 (“After receiving her call, Perich’s employment continued unchanged in form from her time as a contract teacher. During her years with Hosanna–Tabor, Perich taught math, language arts, social studies, science, gym, art, and music. In addition, Perich taught a religion class for thirty minutes a day four days a week and attended a chapel service with her class for about thirty minutes once a week. About twice a year, Perich led the chapel service in rotation with other teachers.”).

73. *Id.* at 884 (“Perich also led her classes in prayer three times a day for a total of five or six minutes and, at least during her final year as a teacher at Hosanna–Tabor, Perich’s class engaged in a devotional for five to ten minutes each morning.”).

74. *Id.*

75. *Id.* at 892.

76. See *EEOC v. Hosanna–Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 782 (6th Cir. 2010), *rev’d*, 132 S. Ct. 694 (2012).

77. *Hosanna–Tabor*, 582 F. Supp. 2d at 892.

Because the school considered “Perich a ‘commissioned minister’ . . . [the district court] conclude[d] that Perich was a ministerial employee,” meaning that the court could make no further inquiry.<sup>78</sup> In its reasoning, the district court looked to Perich’s label as a called teacher, noting that Hosanna–Tabor’s clear distinction between contract and called teachers demonstrates the school’s emphasis on the ministerial role of called teachers.<sup>79</sup> To take the analysis one step further, the district court drew a direct parallel between called teachers and Lutheran ministers, emphasizing that attainment of the “called teacher” label creates “an employment relationship that appears to be governed by the same rules as the church applies to its ordained ministers.”<sup>80</sup>

Aptly aware of how a ruling so favorable to Hosanna–Tabor could be perceived, the district court claimed that this “[was] not a case where the defendant seeks to prove ministerial status after the fact merely to avoid liability [due to the fact that] Hosanna–Tabor treated Perich like a minister and held her out to the world as such long before this litigation began.”<sup>81</sup> With this observation, the court identified the most tremendous advantage the ministerial exception can provide religious employers. Alarming, in like situations, a religious employer may have no conception of the ministerial exception. Indeed, the employer may have no idea such an exemption even exists. Should a discrimination suit like Perich’s come along, however, the employer’s lawyer will surely know of the exception’s expansion. How to tell the difference between the exception’s proper application and its troubling abuse by employers becomes perhaps the defining problem arising from the doctrine’s expansion.

*c. Sixth Circuit Ruling: Outside the Ministerial Exception’s Scope*

In its reversal, the Sixth Circuit found it to be “clear that Perich’s primary function was teaching secular subjects, not ‘spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.’”<sup>82</sup> As a

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78. *Id.* at 892.

79. *Id.* at 891 (“That Hosanna–Tabor distinguishes between ‘lay’ and ‘called’ teachers by awarding the commissioned minister title suggests that the school values the latter employees as ministerial even if some courts would not.”).

80. *Id.*

81. *Id.*

82. *EEOC v. Hosanna–Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 780 (6th Cir. 2010), *rev’d*, 132 S. Ct. 694 (2012) (quoting *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007)).

result of these “factual findings relating to Perich’s primary duties,” the Sixth Circuit held that “the district court erred in its legal conclusion classifying Perich as a ministerial employee.”<sup>83</sup> While the district court had placed significant weight on the school’s actual classification of Perich as a called teacher, the Sixth Circuit employed the popular primary duties test, examining Perich from the outside looking in. The court considered whether Perich acted as a minister in her daily role and activities.<sup>84</sup> Furthermore, the Sixth Circuit argued that the district court’s conclusion of Perich as a ministerial employee, “[g]iven the undisputed evidence that all teachers at Hosanna–Tabor were assigned the same duties . . . would compel the conclusion that all teachers at the school—called, contract, Lutheran, and non-Lutheran—are similarly excluded from coverage under the ADA and other federal fair employment laws.”<sup>85</sup>

Reasoning that such a drastic extension of the exception’s scope would be illogical, the Sixth Circuit defined the “intent of the ministerial exception [as] allow[ing] religious organizations to prefer members of their own religion and adhere to their own religious interpretations.”<sup>86</sup> While the court may have captured the exception’s purpose as it has expanded, this contention does not comport with the exception’s original intent, which is problematic for the ministerial exception to the present day. Finally, although the district court did not view the school’s assertion of the ministerial exception as simply a “way out” of its employment relationship with Perich, Judge White’s concurring opinion questioned the school’s motive, pointing out evidence that “*the school itself* did not envision its teachers as religious leaders, or as occupying ‘ministerial’ roles.”<sup>87</sup>

The incongruity between the district and circuit courts exemplifies the widespread disagreement among lower courts attempting to define the ministerial exception’s scope.<sup>88</sup> These disparate rulings and the Supreme Court’s decision to review the case<sup>89</sup> accentuate the issue’s pertinence.<sup>90</sup> A balance must be struck

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83. *Id.*

84. The court pertinently commented: “The fact that Perich participated in and led some religious activities throughout the day does not make her primary function religious.” *Id.*

85. *Id.* at 781.

86. *Id.*

87. *Id.* at 784 (White, J., concurring). For Judge White, this evidence “[t]ip[s] the scale against the ministerial exception in this case.” *Id.*

88. *See infra* Part II.C–D.

89. The Supreme Court granted certiorari to review *Hosanna–Tabor* on March 28, 2011. *See Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 131 S. Ct. 1783 (2011) (mem.).

between the preservation of free religion and protection from unjust discrimination. The circumstances surrounding *Hosanna–Tabor* frame the necessity for a change to be made in dealing with similar cases. The law must protect employees from inequitable discrimination more substantially than leaving the matter to a court’s discretion.

## II. IN SEARCH OF CONSISTENCY: THE MINISTERIAL EXCEPTION’S VARYING APPLICATION

Since the Fifth Circuit handed down *McClure* in 1972, the ministerial exception has morphed without much restraint or regard for the precedent its expansion has set. In case law from *McClure* to the present, the considerable expansion, and occasional retraction, has left uncertain the ministerial exception’s proper scope of application. By tracing varying approaches to the ministerial exception since its inception in *McClure*, it becomes apparent that *Hosanna–Tabor* presented a unique opportunity for clarification of this elusive doctrine.

### A. Setting the Limit with *McClure*

While the Fifth Circuit left *McClure* without a legal remedy, such a seemingly unfair result grows out of a likely sensible rule. To protect churches from state interference in matters involving their ministers, undoubtedly matters of “prime ecclesiastical concern,”<sup>91</sup> courts will simply refrain from ruling. For a moment, one ought to consider the effects of an opposite ruling by the Fifth Circuit in this case and by similarly situated courts. The court’s hypothetical intervention between The Salvation Army and *McClure*—a church and its minister—would risk setting a dangerous precedent and might constitute state regulation in the church realm. Any thought to entire abandonment of the foundational rule for the ministerial exception under *McClure* vanishes with contemplation of such a far-fetched opposite ruling.

In numerous cases since *McClure*, however, the ministerial exception has applied in questionable sets of circumstances.<sup>92</sup> *McClure*’s impact, therefore, on the ministerial exception is arguably twofold. First, most importantly, *McClure* birthed the ministerial

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90. For a discussion of the Supreme Court ruling in *Hosanna–Tabor*, see *infra* Part V.

91. *McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972).

92. See discussion *infra* Part II.D.



exception. Second, *McClure* set the ministerial exception's limited scope as encompassing the church–minister relationship. Perhaps the ministerial exception should be codified like the statutory exceptions; however, until this legislative enactment, great peril would lie in the exception's complete unavailability to courts properly wishing to stay out of prime church matters.

### *B. Opening the Door with Rayburn*

In the sense that it serves as a strong source for the expanded ministerial exception, *Rayburn* is perplexing. The Fourth Circuit likely could have resolved the issue before it with a no-frills application of the *McClure* rule. The ministerial exception under *McClure*<sup>93</sup> might have barred the woman's claim, as long as the court considered the Seventh-Day Adventist Church to be a church and the pastoral position as that of a minister. Reaching beyond *McClure* to maintain that “[a]s a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered ‘clergy,’”<sup>94</sup> the *Rayburn* court effectively opened the door for employees other than ministers to fit within the ministerial exception's purview. For the facts before it, the court did not need to reach so far. Nonetheless, its reaching set the stage for expansion all the way to *Hosanna–Tabor* and for placement of the doctrine squarely before the Supreme Court.

### *C. Original Intent Approaches to the Ministerial Exception: In Line with McClure*

Aside from *Rayburn*, courts have varied in their application of the ministerial exception.<sup>95</sup> While some have fallen in line with the exception's original intent from *McClure*, others have added kindling to the *Rayburn* fire. The inconsistent results fostered by the ministerial exception establish the wide discretion afforded courts with the doctrine's expanded scope. The remedy must come in the

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93. *McClure* held “that Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister.” *McClure*, 460 F.2d at 560–61.

94. *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (quoting Bagni, *supra* note 39) (internal quotation marks omitted).

95. The cases discussed in the current and following sections (Part II.C–D) are merely illustrative of the several approaches courts have employed in ministerial exception cases.

form of an adjusted inquiry or test. As this section demonstrates, the *McClure* scope strikes the proper balance.

### 1. EEOC v. Mississippi College

Championing the original intent approach to the ministerial exception, the Fifth Circuit in *EEOC v. Mississippi College*<sup>96</sup> clarified that “[i]n *McClure*, this court expressly restricted its decision to the context of the church–minister relationship.”<sup>97</sup> As a religious institution, Mississippi College sought exemption from Title VII coverage after refusing to interview Dr. Patricia Summers for a psychology professorship.<sup>98</sup> Summers had subsequently filed a sex discrimination charge against the College.<sup>99</sup> In considering the College’s contention of coverage within the ministerial exception’s scope, the court refused applicability:

The facts distinguish this case from *McClure*. The College is not a church. The College’s faculty and staff do not function as ministers. The faculty members are not intermediaries between a church and its congregation. They neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine. That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern. The employment relationship between Mississippi College and its faculty and staff is one intended by Congress to be regulated by Title VII.<sup>100</sup>

By the Fifth Circuit’s reasoning, if *McClure* set forth the ministerial exception, the doctrine, properly construed, “exempts . . . only the relationship between a church and its minister and does not apply to the relationship between a religious educational institution and its faculty.”<sup>101</sup> Faithful to *McClure*’s original interpretation of

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96. *EEOC v. Miss. Coll.*, 626 F.2d 477 (5th Cir. 1980).

97. *Id.* at 485.

98. *Id.* at 478 (“Mississippi College is a four-year coeducational liberal arts institution located in Clinton, Mississippi. The College is owned and operated by the Mississippi Baptist Convention . . . an organization composed of Southern Baptist churches in Mississippi.”). Neither the statutory religious organization or curriculum exceptions can apply to these circumstances, as the claim at issue was not based on religious discrimination—the only type of discrimination these two statutory exceptions allow certain religious employers. *See supra* Part I.A.

99. *Id.* at 479.

100. *Id.* at 485.

101. *Id.* at 489.

the ministerial exception, the Fifth Circuit contemplated the dangerous effects of an opposite ruling and reached a reasonable result.<sup>102</sup> More importantly, however, the court arrived at its conclusion by way of the proper inquiry, indeed the paramount issue of all.

## 2. *Rweyemamu v. Cote*

While *Mississippi College* preceded *Rayburn*, several decisions since *Rayburn* have given occasion for a similar approach in adhering to the church–minister relationship under *McClure*. Some cases have been easier for courts than others. For example, *Rweyemamu v. Cote*<sup>103</sup> presented an opportunity for straightforward application of the *McClure* scope. Father Justinian Rweyemamu<sup>104</sup> brought a claim for “racial discrimination in a Title VII suit against the Bishop and the Diocese”<sup>105</sup> that had denied Father Justinian a promotion.<sup>106</sup> As a Roman Catholic priest, Father Justinian’s “duties [were] determined by Catholic doctrine.”<sup>107</sup> The Second Circuit concluded that it “need not attempt to delineate the boundaries of the ministerial exception here, as we find that Father Justinian’s Title VII claim easily falls within them.”<sup>108</sup> Reaching past *McClure*, however, the Second Circuit recognized the current trend of expansion after *Rayburn*: “The ministerial exception protects more than just ‘ministers.’”<sup>109</sup>

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102. The Fifth Circuit considered the critical roles that schools play in society, what with their impact on young, easily influenced students:

Although the number of religious educational institutions is minute in comparison to the number of employers subject to Title VII, their effect upon society at large is great because of the role they play in educating society’s young. If the environment in which such institutions seek to achieve their religious and educational goals reflects unlawful discrimination, those discriminatory attitudes will be perpetuated with an influential segment of society, the detrimental effect of which cannot be estimated.

*Id.* Without question, the court recognized the seriousness surrounding the concept of discrimination and understood the need for its cessation in American law and society.

103. *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008).

104. Father Justinian was “an African-American Catholic priest.” *Id.* at 200.

105. *Id.*

106. *Id.* at 199.

107. *Id.* at 209.

108. *Id.*

109. *Id.* at 206 (citations omitted).

### 3. Guinan and Redhead

Other cases such as *Guinan v. Roman Catholic Archdiocese of Indianapolis*<sup>110</sup> and *Redhead v. Conference of Seventh-Day Adventists*<sup>111</sup> presented fact patterns ripe for a *McClure* approach and results that an original intent analysis would uphold. When a former elementary school teacher in Indiana brought an ADEA claim against her archdiocesan employer, the district court in *Guinan* held the employee's teacher status to bar application of the ministerial exception.<sup>112</sup> Although the former teacher "did participate in some religious activities as a teacher at All Saints . . . it cannot be fairly said that she functioned as a minister or member of the clergy."<sup>113</sup> Likewise, the district court in *Redhead* refused ministerial exception coverage to a religious school whose former teacher was allegedly fired "for being pregnant and unmarried."<sup>114</sup> The court held that "plaintiff [was] not a clergy member and her duties at the Linden School were primarily secular."<sup>115</sup> As in *Rweyemamu*, state and federal courts, like those even in *Guinan* and *Redhead*, similarly cannot resist the urge to recognize the ministerial exception's broadening application beyond *McClure*, as the next set of cases showcasing the doctrine's expansion accentuates further.<sup>116</sup>

#### *D. The Ministerial Exception's Sprawling Scope: In Line with Rayburn*

Beyond the Fourth Circuit's expansive reading of the ministerial exception, courts have continued creaking open the door, heavy with consequences, that *Rayburn* left adequately cracked. Had certain courts construed these broadening cases under the doctrine's original intent, many employees would have passed properly through the litigation process. Instead, the ministerial exception

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110. *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849 (S.D. Ind. 1998).

111. *Redhead v. Conference of Seventh-Day Adventists*, 566 F. Supp. 2d 125 (E.D.N.Y. 2008).

112. *See Guinan*, 42 F. Supp. 2d at 852–854.

113. *Id.* at 852.

114. *Redhead*, 566 F. Supp. 2d at 127.

115. *Id.* at 138.

116. In *Guinan*: "The vast majority of Guinan's duties involved her teaching secular courses, such as math or science." *Guinan*, 42 F. Supp. 2d at 853. Along with *Redhead*, the clear recognition of the primary duties test, widely employed in cases upholding expansion beyond *McClure*, in both of these cases hints that the expansion is creeping into cases in which a pure application of the *McClure* rule would work just as effectively.

afforded these employees no remedy, leaving “[a]ny hope they may have had for attaining justice [to have] come and passed.”<sup>117</sup>

*I. Stately v. Indian Community School of Milwaukee*

As a prime example, *Stately v. Indian Community School of Milwaukee*<sup>118</sup> concerned a teacher who claimed that her private-school employer terminated her position due to her race and religion. In assessing whether the ministerial exception barred Stately’s discrimination claim, the court maintained that the evaluation “begs two questions: (1) Is ICS [the school] a religious institution entitled to the protection of the First Amendment? and, if so, (2) Was Stately’s position a ministerial one?”<sup>119</sup>

In proposing this test, the district court jettisoned the *McClure* inquiry. Instead of ascertaining whether the school was a church, the contention that “Native American religions typically satisfy any constitutional test for ‘religion’”<sup>120</sup> informed the conclusion that “the Court accepts, on this record, that ICS is a religious institution.”<sup>121</sup> The court further traded in contemplation of whether Stately, as a teacher, was a minister for the following line of reasoning: “when a party acts as a liaison between a religious institution and ‘those whom it would touch with its message,’ she is acting in a ministerial role.”<sup>122</sup> On this logic and “[g]iven her instrumental role in developing the spiritual life of her Native American students, Stately’s position was unquestionably ministerial,” according to the court.<sup>123</sup>

The ministerial exception landscape from *McClure* to *Stately* is puzzling. A doctrine intended to exempt the church–minister relationship has somehow expanded to encompass the nexus between a teacher and her Native American school employer.

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117. RAYMOND F. GREGORY, ENCOUNTERING RELIGION IN THE WORKPLACE: THE LEGAL RIGHTS AND RESPONSIBILITIES OF WORKERS AND EMPLOYERS 180 (2011).

118. *Stately v. Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F. Supp. 2d 858 (E.D. Wis. 2004).

119. *Id.* at 867.

120. *Id.*

121. *Id.* at 869.

122. *Id.* (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985)).

123. *Id.* Later in the opinion, the court reinforced its conclusion in constitutional terms: “Probing ICS’s selection of teachers, who propagate its religious message, is an inquiry proscribed by the First Amendment. Accordingly, allowing Stately to proceed on her Title VII [claim] would result in excessive entanglement.” *Id.* at 870–71.

## 2. Petruska, Catholic University, and Hollins

Circuit courts also have utilized the ministerial exception's widened scope to preclude otherwise valid discrimination claims from properly proceeding. *Petruska v. Gannon University*,<sup>124</sup> another decision considering application of the ministerial exception in a school setting, held that "[t]he function of Petruska's position as University Chaplain was ministerial in nature, and therefore, her [claims] must be dismissed."<sup>125</sup> The court neglected to consider the potential gap between a church, as in *McClure*, and a religious institution employer like Gannon University.<sup>126</sup>

In *EEOC v. Catholic University of America*,<sup>127</sup> the circuit court for the District of Columbia evaluated Sister Elizabeth McDonough's sex discrimination claim. Sister McDonough contended that her employer, Catholic University, had discriminated against her in denying her a tenured position to teach Canon Law. Near the outset of its analysis, the court employed interesting diction to suggest the common application of the doctrine: "As stated earlier . . . other courts have *extended* the exception to include employees of religious institutions whose duties are religious in nature."<sup>128</sup> Not only is this assertion rife with shades of *Rayburn* and the primary duties test, but the use of the term *extended* operates as an admission of how other courts have expanded the ministerial exception beyond its intended purpose in *McClure*.

The Sixth Circuit utilized similar terminology in *Hollins v. Methodist Healthcare, Inc.*<sup>129</sup> Even though it had "thus far applied the ministerial exception only to ordained ministers[,] other circuits have *extended* the doctrine to bar employment discrimination claims brought by other employees of a religious institution."<sup>130</sup> The *Hollins*

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124. *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006).

125. *Id.* at 312. According to Petruska—and on strong authority from her employer—her position was terminated on account of her gender. *Id.* at 300.

126. *See id.* at 307; *see also id.* at 299 ("Gannon University is a private Catholic diocesan college located in Erie, Pennsylvania.")

127. *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996).

128. *Id.* at 463 (emphasis added). The court notes previous to this assertion that [t]he ministerial exception has not been limited to members of the clergy. It has also been applied to lay employees of religious institutions whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship . . ."

*Id.* at 461 (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)).

129. *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007).

130. *Id.* at 226 (emphasis added). *See also infra* note 132 and accompanying text.

court clearly strayed from *McClure*: “in order to invoke the exception, an employer need not be a traditional religious organization such as a church, diocese, or synagogue, or an entity operated by a traditional religious organization.”<sup>131</sup> As a result, the court held the ministerial exception to cover Hollins, “a resident in the [Methodist Hospital’s] clinical pastoral education program.”<sup>132</sup>

Perhaps one cannot blame courts for similar reasoning due to the prior expansion of the doctrine. The effect, however, of such decisions is chilling. In *McClure*, the Fifth Circuit worried that any interference between a church and its minister would risk unconstitutional church–state confrontation. An expansive ministerial exception, however, risks leaving unwary employees without a remedy and cast aside from the law’s protection. Meanwhile, insulated employers take a free pass, facing no consequences despite potential discrimination.

### III. SOLVING THE PROBLEM: PROPOSED SOLUTIONS FOR THE MINISTERIAL EXCEPTION

Several scholars have recommended fixes to the nebulous ministerial exception.<sup>133</sup> These proposals for ministerial exception adjustment vary in nature. Some call for a broadened standard,<sup>134</sup> while others align with the present narrowing proposition.<sup>135</sup> Whatever the scholarly sway, each suggestion for doctrinal shift responds to the expansion<sup>136</sup> of an exception that is “supposed to

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131. *Id.* at 225.

132. *Id.* at 224; *id.* at 226 (“We agree with this *extension* of the rule beyond its application to ordained ministers and hold that it applies to the plaintiff in this case, given the pastoral rule she filled at the hospital.” (emphasis added)).

133. See *infra* Part III.A–B.

134. See, e.g., Joshua D. Dunlap, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005 (2007); Todd Cole, *The Ministerial Exception: Resolving the Conflict Between Title VII and the First Amendment*, 4 CHARLESTON L. REV. 703 (2010).

135. See, e.g., Jessica R. Vartanian, *Confessions of the Church: Discriminatory Practices by Religious Employers and Justifications for a More Narrow Ministerial Exception*, 40 U. TOL. L. REV. 1049 (2009); Lauren E. Fisher, *A Miscarriage of Justice: Pregnancy Discrimination in Sectarian Schools*, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 529 (2010).

136. See Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 ME. L. REV. 23, 53 (2010) (“In practice . . . the ministerial exception has extended far beyond that point and become a grant of immunity blocking lawsuits against churches and allowing them to become a law unto themselves. Despite the name of the exception, the cases have not been limited to ministers and priests. Female or gay high school teachers, secretaries, university professors, organists, and choir directors, among others, have had their discrimination lawsuits dismissed because of the churches’ religious freedom to

serve the valid tolerant goals of keeping the state from interpreting religious dogma, intruding on church autonomy, and imposing clergy on the churches.”<sup>137</sup>

*A. Proposals for a Broad Ministerial Exception*

On the broadening end of the spectrum, the primary duties test, as endorsed by *Rayburn* and other cases, may appear unworkable, prompting a call for “the ministerial exception [to] encompass all employment decisions made by churches.”<sup>138</sup> Such a vast standard would simplify the ministerial exception inquiry to one question—whether the employer involved is a church. If so, any and all of its employees would come within the ministerial exception’s purview.

Alternatively, the ministerial exception could broaden through continued usage of the primary duties test by extending “a religious organization’s assertion that its employee is a minister . . . a rebuttable presumption.”<sup>139</sup> Under this standard, religious organizations including and beyond churches would have the ability “to make employment decision[s] based on the furtherance of their religious mission without consideration of legal ramifications and litigation.”<sup>140</sup> Whether through the all-encompassing or rebuttable presumption standard, such a tremendously overbroad ministerial exception would immediately envelop more than proper ministers—a reach far beyond *McClure* that risks sacrificing antidiscrimination safeguards.

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hire as they wish without court interference. In other words, antidiscrimination is not the same for religious as it is for secular organizations.”).

137. *Id.*

138. Dunlap, *supra* note 134, at 2033.

139. Cole, *supra* note 134, at 737. Mr. Cole continues:

Under a rebuttable presumption, as long as a religious organization considers a position essential to the furtherance of its religious mission, it can make employment decisions in regard to that position with the security and confidence that its decisions will be protected by the ministerial exception. Thus, if a church takes the position that an employee’s primary duties are important to the furtherance of that organization’s spiritual and pastoral mission, the burden would be on the employee–plaintiff to establish that he or she is not a minister. This would allow religious organizations to make employment decisions on the basis of their own personal and doctrinal assessments of who would best further their religious mission.

*Id.* at 737–38.

140. *Id.* at 737 (citing *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985)).



*B. Proposals for a Narrow Ministerial Exception*

On the other hand, considerations of congressional intent<sup>141</sup> along with equality and fairness inform the need for a narrower, more historically based ministerial exception. Calls for new tests abound in scholarly work.<sup>142</sup> Moving closer to a more narrowly drawn ministerial exception, “the judiciary should not be swayed by cries of ‘religious liberty.’”<sup>143</sup> Instead, perhaps “so far as the Constitution permits, courts should hold religious employers accountable for their discriminatory acts.”<sup>144</sup> Contrary to their broadening counterparts, narrowing proposals commonly recognize the need to consider the seriousness of the matter at hand. A more expansive ministerial exception may be easier for a court to apply by enhancing judicial efficiency and advancing a simple standard for public comprehension.<sup>145</sup> A narrower exception, however, acknowledges that these cases involve real people who may have been victims of unfair discrimination. An expansive ministerial exception “becomes particularly troublesome when the employee who has suffered adverse employment action is not a ‘minister’ by

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141. See Laura L. Coon, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481, 545 (2001) (“Given the widespread acceptance of the ‘primary duties of the plaintiff’ test, the ministerial exception has the potential to expand to nearly all church employment disputes. Clearly, this was not the intent expressed by Congress in its balance between religious freedom and anti-discrimination interests in Title VII, and is not required by the Constitution if religious doctrine is not implicated. Because religious institutions play an important role in shaping public attitudes and social mores, it is not in the public interest to condone non-religious discrimination by religious organizations if neither the First Amendment nor Title VII requires religious exemption.”).

142. See, e.g., Lauren P. Heller, *Modifying the Ministerial Exception: Providing Ministers with a Remedy for Employment Discrimination Under Title VII While Maintaining First Amendment Protections of Religious Freedom*, 81 ST. JOHN’S L. REV. 663 (2007).

143. Vartanian, *supra* note 135, at 1073.

144. *Id.* Ms. Vartanian continues:

Contrary to the intended purpose of the ministerial exception doctrine, the ministerial-function test grants protection to religious employers beyond that which the Constitution prescribes. If a court is not forced to interpret religious doctrine or resolve competing religious views, it should provide ministerial employees access to the judicial process to pursue Title VII discrimination claims against their religious employers.

*Id.* at 1074.

145. For example, if all employees of a religious organization are deemed within the ministerial exception’s reach, the court need only decide the religious organization question, in addition to the simple inquiry of whether that individual was employed by the organization at issue.

title; instead, he or she might be a principal, a teacher, or even a press secretary.”<sup>146</sup> While development of the ministerial exception has passed from the *McClure* church–minister question to the primary duties inquiry, perhaps “applying a narrower standard to determine whether a teacher actually functions as a minister would lead to results becoming more consistent, both with one another and with the ministerial exception’s original purpose.”<sup>147</sup>

#### IV. CONSTITUTIONAL CONCERNS: THE FIRST AMENDMENT’S RELIGION CLAUSES

Any court considering application of the ministerial exception necessarily contemplates the two Religion Clauses of the First Amendment.<sup>148</sup> The ministerial exception’s utility springs from its attempt “to preserve the First Amendment’s two guarantees, which provide that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’”<sup>149</sup> Accordingly, the present call for the exception’s narrowing must grapple with these constitutional provisions. While one cannot overemphasize the First Amendment’s paramount importance, its application should not extend so far as to prevent possible discrimination cases outside the church–minister context from litigation proceedings.

##### *A. The Establishment Clause*

The First Amendment’s Establishment Clause essentially prevents the government from instituting or supporting a particular religion or church.<sup>150</sup> Though it has not gone without its detractors,<sup>151</sup> a three-part test to determine whether an action violates the Establishment Clause surfaced in *Lemon v. Kurtzman*:<sup>152</sup> “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor

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146. Fisher, *supra* note 135, at 539.

147. *Id.* at 542.

148. See, e.g., *Petruska v. Gannon Univ.*, 462 F.3d 294, 303–304 (3d Cir. 2006); *Coulee Catholic Sch. v. Labor & Indus. Review Comm’n*, 768 N.W.2d 868, 878–880 (Wis. 2009).

149. Vartanian, *supra* note 135, at 1052 (quoting U.S. CONST. amend. I).

150. Heller, *supra* note 142, at 669 (“On a basic level, the Establishment Clause prohibits government endorsement of a particular religion.” (citing PETER K. ROFES, *THE RELIGION GUARANTEES* 30 (2005))).

151. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 91–114 (1981) (Rehnquist, J., dissenting); *Tangipahoa Parish Bd. of Educ. v. Frieler*, 530 U.S. 1251 (2000) (Scalia, J., dissenting); *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting).

152. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”<sup>153</sup> For the Supreme Court in *Lemon*, “[i]n order to determine whether the government entanglement of religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”<sup>154</sup>

The ministerial exception implicates Title VII of the Civil Rights Act of 1964, the ADEA, and the ADA.<sup>155</sup> These statutes satisfy the first two parts of the *Lemon* test, leaving the third and final prong as the relevant inquiry.<sup>156</sup> Application of Title VII, the ADEA, and the ADA to employees of religious institutions outside the church–minister relationship, under this test, should not constitute excessive entanglement. If these statutory provisions encompass some religious employees, the government does not endorse a particular religion, provide a church with any aid, or forge a relationship with a religious authority. Instead, the court examines discriminatory allegations and adjudicates their merits—just as it would with any other type of employer. Under the *Lemon* test, a narrower ministerial exception should not present any entanglement problems.

At times, the Supreme Court has not found the *Lemon* test useful in evaluating whether conduct conflicts with the Establishment Clause. For example, *Van Orden v. Perry*<sup>157</sup> presented the question of whether a stone monument of the Ten Commandments near the Texas State Capitol violated the Establishment Clause.<sup>158</sup> Finding the *Lemon* test unhelpful, the Court held that Texas’s Ten Commandments display did not violate the Establishment Clause,<sup>159</sup> even though the monument’s placement arguably risks perception as

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153. *Id.* at 612–13 (quoting *Walz v. Tax Comm’n of the City of New York*, 397 U.S. 664, 674 (1970)) (citing *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 243 (1968)).

154. *Id.* at 615.

155. *See supra* Part I.B.

156. First, Title VII, the ADEA, and the ADA share the common purpose of employment discrimination prevention—certainly a secular purpose. Second, these three statutes neither in practice nor in effect have any impact on religion as they are written. *See Vartanian, supra* note 135, at 1054 (citing *Redhead v. Conference of Seventh-Day Adventists*, 566 F. Supp. 2d 125, 132–33 n.6 (E.D. N.Y. 2008)).

157. *Van Orden v. Perry*, 545 U.S. 677 (2005).

158. According to the Court, the “22 acres surrounding the Texas State Capitol contain 17 monuments and 21 historical markers commemorating the ‘people, ideals, and events that compose Texan identity.’ The monolith challenged here stands 6-feet high and 3½-feet wide.” *Id.* at 681 (footnote omitted) (citation omitted).

159. *Id.* at 692.

state endorsement of Christianity. While different from the ministerial exception inquiry, *Van Orden* demonstrates that the Establishment Clause will tolerate at least some governmental interaction with religion. Likewise, the First Amendment should tolerate application of antidiscrimination safeguards to individuals short of the pure church–minister relationship.

### *B. The Free Exercise Clause*

A survey of case law interpreting these religious provisions suggests that the Establishment and Free Exercise Clauses “dance around each other, sometimes appearing distinct, and sometimes overlapping.”<sup>160</sup> In the ministerial exception context, *McClure* itself fixated on the Free Exercise Clause and its demands.<sup>161</sup> After suggesting that “the First Amendment has built a ‘wall of separation’ between church and state,” the *McClure* court conceded that the government may impose on church matters when a compelling state interest to do so is present.<sup>162</sup> The court maintained that “[r]estrictions on the free exercise of religion are allowed only when it is necessary ‘to prevent grave and immediate danger to interests which the state may lawfully protect.’”<sup>163</sup>

The *McClure* court additionally discussed the relevant Supreme Court ruling of *Kedroff v. St. Nicholas Cathedral*.<sup>164</sup> In striking down a New York law as unconstitutional, the *Kedroff* Court “stated that ‘legislation that regulates church administration, the operation of churches [or] the appointment of clergy . . . prohibits the free exercise of religion.’”<sup>165</sup> The *McClure* court looked to a few different cases and noted the similarity among them:

A common thread runs through these opinions, which is best exemplified by those words used by the Supreme Court in commenting on its holding in *Watson v. Jones*. For

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160. Heller, *supra* note 142, at 671.

161. See *McClure v. Salvation Army*, 460 F.2d 553, 558–61 (5th Cir. 1972).

162. *Id.* at 558 (“Only in rare instances where a ‘compelling state interest in the regulation of a subject within the State’s constitutional power to regulate’ is shown can a court uphold state action which imposes even an ‘incidental burden’ on the free exercise of religion. In this highly sensitive constitutional area, ‘[o]nly the gravest abuses, endangering paramount interests, give occasion for permissive limitation.’” (alteration in original) (quoting *Sherbert v. Verner*, 374 U.S. 398 (1963) (internal quotation marks omitted))). See also discussion *supra* Part I.B.1.

163. *McClure*, 460 F.2d at 558 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)).

164. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).

165. *McClure*, 460 F.2d at 559 (alteration in original) (quoting *Kedroff*, 344 U.S. at 107).

throughout these opinions there exists “a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”<sup>166</sup>

In sum, the *McClure* court held application of Title VII to the church–minister relationship as an action that would encroach upon the Free Exercise Clause, causing “the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern.”<sup>167</sup> Allowing the court to apply Title VII in this way would “inject[] the State into substantive ecclesiastical matters,” which the Free Exercise Clause will not tolerate.<sup>168</sup>

Since the ministerial exception’s expansion in *Rayburn*, courts have often tapped the Free Exercise Clause as the mechanism prohibiting application of antidiscrimination safeguards to individuals other than proper church ministers.<sup>169</sup> For example, *Starkman v. Evans*<sup>170</sup> involved a Methodist church choir director who claimed that her employer had improperly terminated her position due to her disability. In considering whether Starkman was a minister, the Fifth Circuit postulated that “if Ms. Starkman’s position as a choir director merely required her to ‘perform tasks which are not traditionally ecclesiastical or religious,’ the Church is not ‘entitled to *McClure*-type protection’ under the Free Exercise Clause.”<sup>171</sup> Oppositely, if Starkman had been required to perform ecclesiastical tasks, the ministerial exception by the court’s logic would have applied. In this light, the *Rayburn* expansion to the primary duties test corresponds with a similar inquiry regarding whether an employee’s tasks are ecclesiastical in nature. Accordingly, the *Rayburn* expansion may constitute an attempt to align the ministerial exception inquiry with the demands of the Free Exercise Clause.

Due to the “ambiguity surrounding First Amendment religious freedoms, the reach of the ministerial exception varies from circuit to circuit, depending on the court’s interpretation of the extent to which the First Amendment protects the conduct of religious

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166. *Id.* at 560 (quoting *Kedroff*, 344 U.S. at 116).

167. *Id.*

168. *Id.*

169. *See, e.g.,* *Stately v. Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F. Supp. 2d 858 (E.D. Wis. 2004); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006).

170. *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999).

171. *Id.* at 175 (quoting *EEOC v. Sw. Baptist Seminary*, 651 F.2d 277, 285 (5th Cir. 1981)).

organizations.”<sup>172</sup> For a narrower ministerial exception to prevail, it must comport with the contours of the First Amendment. With an expansive ministerial exception, courts may afford the First Amendment more influence than the key societal policy of allowing discrimination claims to proceed. Under the *McClure* reasoning, the suppression of employment discrimination should qualify as a “compelling state interest” and as a policy that prevents “grave and immediate danger” to society.<sup>173</sup> Qualification as such would free employees outside of the church–minister relationship from Free Exercise Clause limitation. Furthermore, though courts may consider whether an employee performs ecclesiastical tasks, the ecclesiastical question should focus specifically on the church–minister relationship, as it did in *McClure*. The ecclesiastical nature of a church’s minister is obvious, while the duties inquiry can lead to inconsistent results in the same way as the expanded ministerial exception.

Narrowing the exception’s scope strikes the proper balance between the competing concerns of the First Amendment’s Religion Clauses and the policy considerations of curtailing employment discrimination. In construing the First Amendment, courts must not lose sight of the Constitution as a whole. The Framers established their purpose for drafting their founding document in the Constitution’s Preamble: “in Order to form a more perfect Union, establish Justice, . . . [and] promote the general Welfare.”<sup>174</sup> Through the lens of this admirable goal, an expansive ministerial exception that prevents potential discrimination claims from equitable remedies conflicts with the Framers’ intent. The Establishment and Free Exercise Clauses of the First Amendment may impede a narrow ministerial exception; however, the ends of justice and societal welfare deserve equal weight. A ministerial exception limited to the pure church–minister relationship would balance these competing interests fairly.

#### V. TO WASHINGTON: THE SUPREME COURT’S SAY AND FINE-TUNING FOR THE FUTURE

At its core, extended application of the ministerial exception potentially forces an agonizing, detrimental impact on unwary employees. Past courts, in some cases, have refused adequate protection of these individuals, further necessitating the Supreme Court to have its say. With *Hosanna–Tabor*, the Court had the chance

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172. Heller, *supra* note 142, at 670.

173. *McClure*, 460 F.2d at 558.

174. U.S. CONST. pmb1.

to set the ministerial exception record straight.<sup>175</sup> Though the Court did not expressly construe the exception in its original form under *McClure*, it came close—unanimously finding the exception to cover the plaintiff, yet refusing to announce a formal test for the ministerial exception.<sup>176</sup> Onward from *Hosanna–Tabor*, courts ought to adhere to the *McClure* formula in applying the ministerial exception, while any additional protections for religious employers outside the doctrine, should they be required, ought to be incorporated by Congress alongside the statutory exceptions.

*A. The Supreme Court’s Hosanna–Tabor Ruling: Within the Ministerial Exception’s Scope*

Near the outset of its analysis, the Court noted the clear import of the Constitution’s Religion Clauses, hinting that it would indeed recognize the ministerial exception that had bounced around the lower courts for decades.<sup>177</sup> Prior to inquiring whether the Lutheran school teacher, Cheryl Perich, fit within the ministerial exception’s purview, the Court provided its rationale for the exception’s existence in the first place:

We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the

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175. For background on *Hosanna–Tabor*, see *supra* Part I.B.3.

176. *Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012) (“We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister.”); *id.* at 710 (“We express no view on whether the exception bars other types of suits . . . . There will be time enough to address the applicability of the exception to other circumstances if and when they arise.”).

177. *Id.* at 702 (“Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.”). See also *id.* at 705 (“Until today, we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment. The Courts of Appeals, in contrast, have had extensive experience with this issue.”).

faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.<sup>178</sup>

Declining to adopt a test for future ministerial exception inquiries,<sup>179</sup> the Court provided four reasons for reversing the Sixth Circuit and concluding that “Perich was a minister covered by the ministerial exception”—“the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church.”<sup>180</sup>

First, the Court explained how Hosanna–Tabor had “held Perich out as a minister,” issuing her a vocational diploma that gave her the title “Minister of Religion, Commissioned.”<sup>181</sup> Second, Perich’s title “reflected a significant degree of religious training followed by a formal process of commissioning.”<sup>182</sup> Even as Perich worked extensively to complete the colloquy requirements, her commissioning as a minister became official “only upon election by the congregation, which recognized God’s call to her to teach.”<sup>183</sup> Third, the Court found Perich to have held herself out as a minister through actions, among others, such as claiming on her taxes a housing allowance “available only to employees earning their compensation ‘in the exercise of the ministry.’”<sup>184</sup> Finally, the Court contemplated Perich’s function in her day-to-day tasks, clarifying that her “job duties reflected a role in conveying the Church’s message and carrying out its mission.”<sup>185</sup>

With this fourth and final consideration, the primary duties test clearly surfaced; however, this test, popular in so many prior lower court decisions, did not comprise the sole ministerial exception inquiry for the Supreme Court. In fact, the Court faulted the Sixth Circuit for overemphasizing Perich’s duties.<sup>186</sup> Most notably, the Sixth Circuit “gave too much weight to the fact that lay teachers at the school performed the same religious duties as Perich” and “placed too much emphasis on Perich’s performance of secular duties.”<sup>187</sup> By taking issue with the Sixth Circuit’s analysis, the Supreme Court effectively derailed any thought that the primary

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178. *Id.* at 706.

179. *See supra* note 176 and accompanying text.

180. *Id.* at 708.

181. *Id.* at 707.

182. *Id.*

183. *Id.*

184. *Id.* at 708.

185. *Id.*

186. *See id.* at 708–09.

187. *Id.* at 708.



duties test, though relevant as one part of its inquiry,<sup>188</sup> would itself determine the outcome in this case:

[The Sixth Circuit] did regard the relative amount of time Perich spent performing religious functions as largely determinative. The issue before us, however, is not one that can be resolved by a stopwatch. The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above.<sup>189</sup>

Among those other considerations, the Court further faulted the Sixth Circuit for "fail[ing] to see any relevance in the fact that Perich was a commissioned minister."<sup>190</sup> Though "such a title, by itself, does not automatically ensure coverage," according to the Court, "the fact that an employee has been ordained or commissioned as a minister is surely relevant."<sup>191</sup> The Court notably pointed to the intensive training Perich had completed to obtain her title, as well as the "recognized religious mission" at the core of her position.<sup>192</sup> As such, the Court found it "wrong for the Court of Appeals . . . to say that an employee's title does not matter."<sup>193</sup>

These several errors thus militated against Perich's case. The ministerial exception would not only prohibit Perich's recovery, but it would preclude her suit altogether. Announcing its holding in absolute terms, the Court raised the constitutional shield, leaving the "Church" free to make its own employment decisions regarding its "ministers":

Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer. The EEOC and Perich originally sought an order reinstating Perich to her former position as a called teacher. By requiring the Church to accept a minister it did not want, such an order would have plainly violated the Church's freedom under the Religion Clauses to select its own ministers.<sup>194</sup>

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188. *Id.*

189. *Id.* at 709.

190. *Id.* at 708.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 709.

Though referencing *McClure* elsewhere as the exception's foundation,<sup>195</sup> the Court could have cited *McClure* in its holding. This formulation of the ministerial exception inquiry grows out of the *McClure* original intent standard, springing forth the exception's roots as a guidebook for the future.

*B. Fine-Tuning and Collapsing the Expansive Approach*

On the *Hosanna-Tabor* appeal, the Sixth Circuit employed a dual-pronged approach to determine whether Perich fit within the ministerial exception—an approach appropriate due to the expansion this key doctrine has endured yet one in need of some historically based fine-tuning, which the Supreme Court would eventually provide. In general terms, for the ministerial exception to apply under the Sixth Circuit's scope, “the employer must be a religious institution” and “the employee must be a ministerial employee.”<sup>196</sup> In deciding that Perich ultimately did not fit within the ministerial exception, the Sixth Circuit crafted its opinion based on the expanded inquiry, as in cases like *Statelty*, *Petruska*, *Hollins*, and others.<sup>197</sup> The court could have used a history lesson in order to frame the test more faithfully to the ministerial exception's original construction.

When the Sixth Circuit court chose to conduct a ministerial exception inquiry, it should have done its homework on the doctrine's original intent as established in *McClure*: “We therefore hold that Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister.”<sup>198</sup> As the ministerial exception has been applied to cases implicating the ADA and other federal employment discrimination regulations, the court felt a ministerial exception inquiry to be appropriate; however, the court should have considered whether Perich's employer was a “church” and whether Perich as employee was its “minister,” as *McClure* set forth.

Under the narrower *McClure* test, each of the two prongs utilized in the Sixth Circuit's *Hosanna-Tabor* test effectively collapses. The first prong breaks down from the broader inquiry of whether the employer qualifies as a “religious institution” to the narrower question of whether the employer is a “church.” One need

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195. See *id.* at 710; *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

196. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 778 (6th Cir. 2010), *rev'd*, 132 S. Ct. 694 (2012).

197. See discussion *supra* Part II.D.1–2.

198. *McClure*, 460 F.2d at 560–61.

only look to *Hollins*<sup>199</sup> to learn that the expanded inquiry for the first “religious institution” prong, as reflected in the Sixth Circuit’s *Hosanna–Tabor* decision, is not limited to churches and the like but apparently extends to religious entities and beyond.<sup>200</sup>

Similar to the first, the second prong collapses from the broader inquiry of whether the employee occupied a “ministerial” role—that is, one who performs ministerial duties—to the narrower question of whether the employee is a “minister.” Though it may seem a small, insignificant shift in terminology, the difference between one who is a “minister” and one whose occupation is “ministerial” in nature can be substantial. For example, if a lay individual is hired to work as a religion teacher, his day-to-day tasks may arguably be ministerial in nature; however, he likely, and quite reasonably, considers himself a religion teacher—not a minister of the church. This contrast draws a fine distinction, but it makes a noteworthy difference with potentially far-reaching implications.<sup>201</sup>

The Supreme Court has at least begun to move in the *McClure* direction. Three key areas of its *Hosanna–Tabor* majority opinion showcase this critical progression.<sup>202</sup> First, the Supreme Court’s definitive recognition that the ministerial exception indeed occupies a niche in employment discrimination law repeatedly uses the terms *church* and *minister* to describe the exception’s nature.<sup>203</sup> In contrast, previous lower court decisions endorsing an expansive approach to the exception queried broadly whether the employer was “religious” and whether the position at issue was a “ministerial” one.<sup>204</sup> Second, the Court refused to classify the *Rayburn* primary duties test as the ministerial exception’s dispositive inquiry.<sup>205</sup> Third, the Court’s holding classified Perich as a “minister” and her

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199. See discussion *supra* Part II.D.2.

200. See *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007).

201. The concept of being “on notice” seems to play something of a role here, as well. If the ministerial exception is to be fairly applied, one to whom the exception could apply ought to know of the great risk that acceptance of the job carries with it. It hardly seems fair for this same religion teacher to accept his job, work diligently all the while, and then have his employer terminate his position, without consequence, due to his disability. The continued extension of the ministerial exception risks this type of harsh treatment to employees undeserving of such abuse. This hypothetical embodies the very risk that an expanded ministerial exception runs.

202. See discussion *supra* Part V.A.

203. See *supra* text accompanying note 178. The Court also uses the term *religious group* in this excerpt—but only once, as compared to the several appearances of the term *church*.

204. See discussion *supra* Part II.D.

205. See *supra* text accompanying notes 186–93.

employer as a “church” in the same way that the Fifth Circuit in 1972 identified McClure as a “minister” who had been unjustly discharged by her employer “church.”<sup>206</sup> For the Supreme Court, “[w]hen a *minister* who has been fired sues her *church* alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The *church* must be free to choose those who will guide it on its way.”<sup>207</sup>

*C. Moving Forward: Thoughts for the Future*

The Supreme Court’s review of *Hosanna–Tabor* presented the perfect opportunity for articulation of a test reflecting the ministerial exception’s original intent. The Court refused to announce such a test.<sup>208</sup> The Court, however, upheld application of the ministerial exception due to (i) the fact that Perich’s employer was a church and (ii) the fact that Perich, as employee, was a minister of her employer church. This finding faithfully adheres to the pure ministerial exception, as *McClure* originally intended.

Though the majority opinion reads as if inching back toward *McClure*, doubt remains as to whether all justices are fully on board.<sup>209</sup> In a concurring opinion, Justice Alito, joined by Justice Kagan, held fast to “[t]he *functional* consensus [that] has held up over time.”<sup>210</sup> In the first place, Justice Alito maintained that courts faced with ministerial exception cases “should focus on the function performed by persons who work for religious bodies.”<sup>211</sup> For Justice Alito, as in *Rayburn* and other primary duties cases, the exception “should apply to any ‘employee’ who leads a religious organization, conducts worship services or important religious ceremonies or

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206. See *supra* text accompanying note 194.

207. *Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012) (emphasis added).

208. See *id.* (“The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her. Today we hold only that the ministerial exception bars such a suit.”). In a brief concurrence, Justice Thomas noted that “[j]udicial attempts to fashion a civil definition of ‘minister’ through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the ‘mainstream’ or unpalatable to some.” *Id.* at 711 (Thomas, J., concurring). For Justice Thomas, the inquiry should hinge on whether the employer involved “sincerely considered” the employee as a minister: “[I]n my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization’s good-faith understanding of who qualifies as its minister.” *Id.* at 710.

209. See *id.* at 711–16 (Alito, J., concurring).

210. *Id.* at 714 (emphasis added).

211. *Id.* at 711.

rituals, or serves as a messenger or teacher of its faith.”<sup>212</sup> Concurring with the majority that Perich still fit this functional inquiry—closely resembling the primary duties test of many lower courts—the Court reached a unanimous result; however, the appropriate inquiry or proper test to arrive at this result remains clearly unsettled.<sup>213</sup>

At the end of the day, any further expansion on the pure church–minister ministerial exception must come through legislation. Congress has already set forth statutory exceptions related to religion.<sup>214</sup> In addition to the religious organization, religious

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212. *Id.* at 712. Justice Alito also deemphasized the relevance of an employee’s title of minister: “[W]hile a ministerial title is undoubtedly relevant in applying the First Amendment rule at issue, such a title is neither necessary nor sufficient.” *Id.* at 713.

213. Closer to home in Louisiana, the United States Fifth Circuit Court of Appeals had its first opportunity since the Supreme Court’s *Hosanna–Tabor* decision to rule on a ministerial exception case with *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012). Echoing the Supreme Court, the Fifth Circuit noted that “it may not be possible to develop a one-size-fits-all approach to the ministerial exception.” *Id.* at 176. The Fifth Circuit concluded that the plaintiff–music director terminated by his church employer fit within the ministerial exception “[b]ecause [he] performed an important function during the service” and “played a role in furthering the mission of the church and conveying its message to its congregants.” *Id.* at 180. Though reflecting that “the ministerial exception permits the church to pick its own ministers and do so using its own criteria,” the Fifth Circuit in *Cannata* read the functional–primary-duties test as determinative rather than as one part of the “minister” inquiry. *Id.* at 179. Other lower court cases since the Supreme Court’s *Hosanna–Tabor* ruling likewise demonstrate the lacking consensus. *See, e.g.,* *Headley v. Church of Scientology Int’l*, 687 F.3d 1173, 1181 (9th Cir. 2012) (“The district court was right to recognize that courts may not scrutinize many aspects of the minister–church relationship.”); *Herzog v. St. Peter Lutheran Church*, No. 11 C 5480, 2012 WL 3134337, at \*4–6 (N.D. Ill. Aug. 1, 2012) (holding a called teacher in strikingly like circumstances to Perich as fitting within the ministerial exception under a similar analysis as the Supreme Court in *Hosanna–Tabor*); *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 WL 1068165, at \*5 (S.D. Ohio Mar. 29, 2012) (holding a Technology Coordinator and teacher at a Catholic school outside the ministerial exception as she “had received no religious training or title and had no religious duties”).

214. *See supra* Part I.A. Courts have wrestled readily with statutory exception language in the employment discrimination field. *See, e.g.,* *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458 (9th Cir. 1993) (denying the religious organization, religious curriculum, and BFOQ exceptions to an employer–school that had terminated a teacher because she was not Protestant); *LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217 (3d Cir. 2007) (extending the religious organization exception to a “primarily religious” employer that had fired a bookkeeper allegedly on account of her Christianity); *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011), *cert. denied*, No. 10-1316, 2011 WL 4530150, at \*1 (Oct. 3, 2011) (mem.) (extending the religious organization exception to a

curriculum, and BFOQ exceptions, ordinary employers must accommodate their employees' religious beliefs,<sup>215</sup> further exemplifying the critical consideration that Congress has attributed these delicate matters. Perhaps the statutory exceptions currently in place do not go far enough. One may likewise argue that the protections courts have granted employers over the years by virtue of the extended ministerial exception are fair and sensible. For religious protections and exceptions to be consistently and fairly applied, however, Congress should establish these safeguards. Otherwise, the unbridled, unpredictable expansion of the judge-made ministerial exception risks unjust discrimination, with the employer ultimately suffering no consequences for perhaps unfairly terminating or refusing to hire a particular individual.

#### CONCLUSION

With the statutory exceptions, all courts grapple with the same language that seeks to elicit one clear standard. Congress has set clear statutes for courts to interpret as they deem proper. Unlike its statutory counterparts, the ministerial exception stands on unsteady footing—its foundation morphing haphazardly depending on the court and the doctrine's previous extension. Thus, no consistent, workable standard has emerged.

To ensure the ministerial exception's fair application, courts should base the doctrine's scope on a single principle, aligning the ministerial exception with the uniform nature of the statutory exceptions. Faithful to the ministerial exception's original intent, *McClure* provides this key foundation. The church–minister relationship provided the firm basis for the ministerial exception in the first place. Though not itself statutory, the *McClure* principle that a court ought to refuse to regulate the employment relationship between a church and its minister should operate as the common standard for courts to interpret in the same way that courts wrestle with statutory exception language.

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“primarily religious” employer that had fired three employees for denying Jesus Christ and the Holy Trinity).

215. See 42 U.S.C. § 2000e(j) (2006) (“The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or a prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”).

A court's refusal to dig down and spring forth the ministerial exception's roots to the present day risks attributing too much weight to the First Amendment.<sup>216</sup> Instead, any further First Amendment influence should arise through more numerous statutory exceptions. Until Congress effects such legislation, the ministerial exception should remain limited to its original scope and intent. If not through this original intent remedy, then by some other should the ministerial exception narrow to preclude its overbroad injurious impact.

*Blair A. Crunk\**

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216. As this Comment demonstrates, courts have generally favored the First Amendment in extending the ministerial exception beyond its original form. *See* discussion *supra* Parts I.B, II.A–D, IV.A–B.

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